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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091.

VIRGIL OGLETREE and KATHRYN BISHOP,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

REPLY BRIEF OF PETITIONERS
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

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I.

Respondent's Brief in opposition, in its counter-statement of facts, sets forth the following selected points:

1. That on March 25th [the day prior to the arrest and search involved here] a police officer "saw Virgil Ogletree, a known clearinghouse operator and others going into the house" that was searched;

2. And "that armed with the information given him by a reliable informer, the officer went to the Cleveland Municipal Court" and obtained a search warrant (Respondent's Brief, pp. 6-7).

3. Further, that "the officer did not rely solely upon the information he had concerning the clearinghouse activity at this address. He went further and actually made a positive observation at the precise point where the information concerning clearinghouse activity had indicated" (Respondent's Brief, p. 7).

Based on these selected excerpts of his argument, it is apparent that Respondent is attempting thereby to suggest that the reliability of their undisclosed informant was established "in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in the opinions of this Court applying that Amendment" *Ker v. California,* 374 U. S., at 33.

The above argument, it is hereby submitted, is unsound for a number of reasons. First, it is factually inaccurate. This is so not merely because we have only the word of the officer that Ogletree was "a known clearinghouse operator," and it was established that Ogletree had never been convicted of any such offenses. But even more than this, the factual inaccuracies being delineated go to the crucial statement that the affiant officer saw Ogletree and others enter this house, and to the statement, in the Brief, that the alleged observation was made "at the precise point where the information concerning clearinghouse activity had indicated" (*ibid*). Yet, it is from these asserted facts they argue this case presents "credible information from a reliable informant plus actual observation by police officers" (*ibid*).

Quite possibly the reason Respondent's Brief fails to direct us to any page reference in the record for these bold assertions is because counsel must know the record cannot support his thesis. Necessarily then, as was said in *Beck v. Ohio,* 379 U. S., at 97, it is possible that an informer did in fact relate information to the police, and that information may have been precisely what Respondent has suggested in his brief—that is, that there was clearinghouse activity at the address given—but the record must show, and this record does not, "what the informer actually said, and why the officers thought the information was credible." (*ibid*).

Again, it is our contention that this warrant is constitutionally defective when analyzed by the formula gleaned from *Aguilar v. Texas*, 378 U. S. 108 and *United States v. Ventresca*, 380 U. S. 102. More specifically, the magistrate in this case was not told any of the underlying circumstances from which the informant drew his conclusions (whatever they were), nor were any of the underlying circumstances from which the affiant concluded that his undisclosed informant was "credible" or his information "reliable" disclosed. The result then is inescapable, the necessary inferences from these "facts" were not drawn "by a neutral and detached magistrate" as the precedents require, but by a police officer "engaged in the competitive enterprise of ferreting out crime" (*Giordenello v. United States*, 357 U. S., at 486), or "by an unidentified informant" (*Aguilar v. Texas, supra*).

This conclusion, it is submitted, is even more cogent in view of this Court's recent decision in *McCray v. Illinois*, ____ U. S. ____, 36 U. S. Law Week 4261. For if it were otherwise a police officer would indeed be the sole judge of the existence of probable cause and the requirement that an affidavit must support the magistrate's disinterested determination would pale into insignificance.

II.

The other arguments made in Respondent's Brief are of the routine variety. For example, they resort to the meaningless statement that "a prosecuting attorney is not required to disclose the state's evidence through a Bill of Particulars" as being the complete answer to the timely and realistic request by an accused for some meaningful articulation of the charge being made against him (Brief in Opposition, pp. 5-6). Also they argue that since the request for a Bill of Particulars by the Petitioner Bishop,

was a carbon copy of Ogletree's request, a Bill of Particulars having been furnished Ogletree, under the circumstances, that was sufficient (*ibid*). The short answer to this, of course, is that guilt remains personal and individual, and it is no answer to say that because one defendant was given a "Bill of Particulars," the same suffices for all. This argument we make quite apart from the fact that even as to Ogletree, the Bill given him was defective.

And the Respondent's argument that their comment on the failure of the co-defendants to testify was, if anything, favorable to these Petitioners must be classified as a classic. Surely it can not be, in a case where eight people are charged with "carrying on" (whatever that means) a scheme of chance, and the jury is charged that those on trial could be convicted on an aider and abettor theory, that a general verdict of guilty against all eight can be tortured to mean those whose convictions were affirmed were the principals while those whose convictions were reversed were merely aiders and abettors. Not only this but the belief is sure, or at least "beyond a reasonable doubt" (*Chapman v. California*, ____ U. S. ____, 32 U. S. Law Week, at 4199), that the constitutional error complained of did not influence or "contribute to the verdict obtained" against these Petitioners (*ibid*).

III.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in their petition for Writ of Certiorari, petitioners renew their prayer that the petition for Writ of Certiorari be granted.

Respectfully submitted,

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